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Supreme Court of the United States

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF ON BEHALF OF APPELLANT

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CASES AND STATUTES CITED

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FRANK EICHHOLZ, Appellant,

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PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ROY McKITTRICK, Attorney-General of the State of Missouri, and B. M. CASTEEL, Superintendent State Highway Patrol, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

APPELLANT'S BRIEF AND ARGUMENT

Official Report of Decision Under Review

The decision of the report below is reported in 23 Federal Supplement, at page 587.

Statement of Grounds of Jurisdiction

Appellant has complied with Paragraph 1 of Rule 12 of this court and a statement of jurisdiction has been printed under separate cover, to which reference is made in this brief.

STATEMENT OF THE CASE

This action was instituted to enjoin the Public Service Commission of Missouri from enforcing an order made pursuant to its Rule 44, and from causing the arrest and prosecution of

appellant for the transportation of freight in commerce of a character admittedly interstate, and also from arresting and prosecuting him for certain acts of freight transportation of a disputed character. There is no claim or charge that State police regulations were being violated by the admittedly interstate transactions. As to the disputed transactions, appellant neither obtained nor sought an intrastate permit, but upon the belief that such transactions were interstate in character, he claimed the right to engage in them under an interstate permit he held prior to its revocation under circumstances hereafter related.

Appellant Eichholz operates a fleet of freight trucks in interstate commerce between the states of Missouri, Iowa, and Kansas, and for that purpose, maintains depots or terminal facilities in St. Louis, Missouri; Des Moines, Iowa; Burlington, Iowa; Kansas City, Kansas and Wichita, Kansas. (Record, P. 89.) His interstate operations date back prior to the effective date of the Federal Motor Carrier Act of 1935 (See Appendix), and prior to a time when there was legislative regulation in Missouri either of intrastate or interstate freight transportation by motor vehicle. (Record, P. 89.) After legislation had been enacted in Missouri, he sought and obtained from the Missouri authorities a permit to engage in interstate transportation of freight over the highways of that state, and complied with all rules and regulations preliminary to the granting of the same, particularly with respect to the character of vehicles used, safety lights and equipment and insurance requirements. He neither sought nor obtained a permit to engage in intrastate transactions in Missouri. (Record, P. 89.)

When the Federal Motor Carrier Act of 1935 became effective, he sought, by application to the Interstate Commerce Commission, continuance of his privilege to engage in his interstate operations and issuance of a proper certificate in evidence of the same. His application has not yet been finally passed upon by the Commission. (Record, P. 92.) Meantime, under the terms of the Federal Act, he is privileged to continue such operations under Federal regulation.

Appellant's Kansas City, Kansas, depot or terminal was located and established very early in his operations. He had never established another terminal in the "Greater Kansas City" area. Its location was chosen for its convenient access to connecting carriers and to the greater number of shippers

who patronized him with more or less regularity. (Record, P. 90.)

Surrounding all his depots or terminals (including the terminal at Kansas City, Kansas), and within a radius of twenty-five miles thereof, appellant had established a "pick-up" and "delivery" service, the full details of the operation of which were on file with the Interstate Commerce Commission and with the Public Service Commission of Missouri. Briefly, operations consisted in "picking-up" shipments of consignors, transporting them to terminal or depot and there unloading the less-than-truck-load shipments onto the dock or onto the larger line-haul trucks which transported them to the terminal of destination. These line-haul trucks were of the tractor-trailer type. Accordingly, as to a full-truck-load consignment, an exchange of tractor and driver was necessary, but actual unloading at the dock was unnecessary. In every case, however, the shipment had to be dealt with at the terminal, where the operations of weighing, checking, inspecting, making out freight bills, making C. O. D. collections, assigning line-truck drivers, etc., were performed. The "delivery" service operated in a corresponding manner at the terminal of destination. Every shipment, large and small, traversed the full distance between terminals for these dealings, before they entered the phase of "pick-up" and "delivery" service. (Record, P. 90.)

The operations of this "pick-up" and "delivery" service at the Kansas City, Kansas, terminal necessarily extended into parts of Kansas City, Missouri. Such of these shipments as were picked up or delivered in Kansas City, Missouri, which were respectively destined for, or had originated in St. Louis, Missouri, were conceived by the Public Service Commission of Missouri, to be intrastate in character. The relation of the sum of these shipments to the sum total of appellant's commerce transactions was variously estimated at from 5% to 10%—that is to say, 90% of his commerce was indisputably interstate in character. (Record, P. 91.) In this connection it should be stated that there was a rate differential between intrastate and interstate carriage, the latter having the lower rate. Both rates, however, were the approved rates of the authority having respective jurisdiction thereover.

With this conception that appellant was engaging, in part at least, in intrastate transactions without an intrastate permit in violation of its Rule 44 (see Appendix), the Public

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Service Commission cited him to appear and show cause why his interstate permit should not be revoked. A hearing resulted in its revocation, thus denying appellant of the right to use the highways of Missouri at all.

In this situation, appellant instituted this action to restrain state officials from arresting, prosecuting or otherwise interfering with his operations in interstate commerce across Missouri. No injunctive relief was sought to restrain the State Treasurer from collecting lawful licenses and other fees that would accrue during such operations, said treasurer being the official designated by statute to receive such licenses and fees. A statutory three-judge court was convened, and temporary injunction was granted in accordance with a per curiam opinion appearing at page 8 of the Statement as to Jurisdiction, and the case later went to trial on the merits.

At the trial, appellee Public Service Commission presented for the first time a counterclaim for the recovery of license fees and dues alleged to have accrued during the period of the temporary injunction, although the Commission has no statutory authority to maintain an independent action for that purpose, and no right or authority to collect the same has been advanced in substantiation of the Commission's authority (Record, P. 77.) For this reason, and for the additional reason that Equity Rule 30 (see Appendix), forbade the entertainment of a counterclaim in these circumstances, objection was, and is here made to its consideration by the trial court on the ground that it had no jurisdiction to entertain it.

In due time after trial, the court rendered opinions dissolving the temporary injunction, denying the permanent injunction and finding against appellant on the counterclaim in full of the amount of accumulated fees, the parties were given thirty days in which to agree upon the amount; otherwise a special master would be appointed to ascertain the amount. On May 10, 1938, a decree was entered in accordance with the opinion of the court. Three opinions were rendered in the case, two representing the majority and one representing a dissenting minority. All opinions appear at pages 53 to 77, inclusive, of the Record, and are officially reported in 23 Fed. Supp. 587, et seq.

As will clearly appear from the majority opinions, one of the principal attacks upon the disputed operations of appellant was aimed at their good faith. At the time referred to in the evidence, there existed, as previously stated, a rate differential

between intrastate and interstate carriage of freight, the latter rate being the lower. That all freight crossed the state line into Kansas is not disputed. (Record, P. 71.) Appellee contends the crossing was a subterfuge to favor his patrons with the lower rate. Appellant, on the other hand, showed by the evidence that all freight must be dealt with at the terminal both before shipment and before delivery in the manner previously stated. (Record, P. 89-90).

It is the contention of appellant that the District Court abused its descretion in denying the permanent injunction, first, because it ascribed motives of bad faith in routing the disputed freight through the Kansas City, Kansas, terminal, inferred solely from the rate differential, and ignored the business reasons that made such routing necessary; second, because in denying it, appellant was left without protection from arrest, prosecution, fines and penalties, even as to the 90% of admittedly interstate transactions; third, because it makes motive control the character of the commerce, in defiance of the Congressional and judicial definition of the term "interstate commerce"; fourth, it placed the power of the State over the power of the Federal government in the regulation of commerce between states, by permitting the State's definition to control the Federal.

ASSIGNMENT OF ERRORS

1. The lower court erred in its conclusion of law that the act of the Public Service Commission of Missouri, in cancelling and revoking appellant's interstate permit under the circumstances of this case was a valid and constitutional exercise of its powers.

2. The lower court erred in not finding as a conclusion of law that the transportation of freight from Kansas City, Missouri, to St. Louis, Missouri, through appellant's fixed terminal or depot in Kansas City, Kansas, and from St. Louis, Missouri, to Kansas City, Missouri, through appellant's fixed terminal or depot in Kansas City, Kansas, constituted transportation in interstate commerce within the definition of that term as found in the Federal Motor Carrier Act of 1935 (U. S. C. A., Title 49, section 303 (a), par. 10). (See Appendix.)

3. The lower court erred in construing Rule 44 of the Public Service Commission of Missouri as applicable to any of appellant's operations between Kansas City, Missouri, and St. Louis, Missouri, which invariably required the shipments to pass through appellant's fixed terminal or depot in Kansas City, Kansas.

4. The lower court erred in not finding as a conclusion of law that Rule 44 of the Public Service Commission of Missouri, as applied by that commission to the transportation of freight across state lines, is unconstitutional and void because it is in direct conflict with the Congressional definition of interstate commerce contained in the Federal Motor Carrier Act of 1935.

5. The lower court erred in finding as a fact that the method of operation employed by the appellant was designed and intended to afford shippers the benefit of a lower rate (both the interstate and intrastate rates having been authorized by the respective Commissions) and that the transportation service rendered by him between St. Louis, Missouri, and Kansas City, Kansas, was not in good faith.

6. The lower court erred in finding as a conclusion of law that by accepting an interstate permit the appellant had

waived the right to challenge the constitutional validity of Rule 44 promulgated by the Public Service Commission of Missouri.

7. The lower court erred in finding as a conclusion of law that the appellant had violated the express terms of his interstate permit.

8. The lower court erred in not finding as a conclusion of law that the counterclaim filed in this cause by the Public Service Commission does not comply with Equity Rule No. 30, could not be made the subject of an independent suit against this appellant by the Public Service Commission of Missouri, and should be dismissed.

SUMMARY OF THE ARGUMENT WITH AUTHORITIES

ON THE MOTION TO DISMISS

I.

First Ground

Appellant's Jurisdictional Statement is not subject to the motion to dismiss.

(a) It conforms to Rule 12 of this court.

(b) It shows a justiciable question for this court.

(c) It does not perform the function of an assignment of errors, nor need it necessarily call attention to all the grounds reviewable on appeal.

(d) If the action complained of is unconstitutional and without authority, the Statement need not detail the alleged reasons that prompted the Commission to take the action.

II

Second Ground

The judgment on the injunction was final. It denied unconditionally the permanent injunction. In these circumstances an appeal to this court is provided. (U. S. C. A. Title 28, Sec. 380.)

The judgment on the counterclaim was final. The ascertainment of the amount, after this appeal was taken, was a ministerial act in fulfillment of the judgment of the court. Furthermore, the trial court had no jurisdiction to entertain it, under Equity Rule 30.

Smith vs. Vulcan Iron Works, 165 U. S. 518; 17 Sup. Ct. 407;

McGourkey vs. Toledo & Ohio Ry. Co., 146 U. S. 536; 13 Sup. Ct. 170;

3 C. J. pp. 448, 449.

ON THE MERITS

I.

The Commission may not, merely by refusing an interstate permit or by granting one upon condition, **prohibit** for any

reason the transportation in interstate commerce of a single pound of freight.

Buck vs. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324;
Florida ex rel. Motor Co. vs. Florida R. R. Commission, 166 South, 840;
Southwestern Greyhound Company vs. R. R. Commission, 99 S. W. (2d) 263, 268, 109 ALR 1235.

(a) A state statute purporting to give it this authority violates Article 1, Section 8 of the Federal Constitution.

(b) The limit of the Commission's authority is reasonable regulation of interstate commerce as agent of the state under its conceded police powers, and to punishment for non-compliance with such regulations.

c) To threaten punishment of appellant only and alone for engaging in admittedly interstate transactions after revocation of a perviously granted interstate permit, is one situation; to punish him for violation of lawfully imposed police regulation is quite another. The latter the Commission may do; the former it may not. Hence this appeal from a judgment denying injunctive relief from punishment from causes alone growing out of the first named situation.

(d) This phase of the case does not rest upon the character of the disputed transactions. It rests upon the power of the state to prohibit transactions in commerce admittedly interstate in character.

By reason of these considerations, the judgment of the District Court that the revocation of the interstate permit constituted a lawful exercise of authority by the Public Service Commission, was an abuse of judicial discretion.

II.

The character of the disputed commerce was interstate and not intrastate, as held by the Public Service Commission and by the District Court.

Hanley vs. Kansas City Southern Railway Co., 187 U. S. 617, 47 L. ed. 333;
Western Union Telegraph Company vs. Speight, 254 U. S. 17, 65 L. ed. 104;

Missouri Pacific Railroad Company vs. Stroud, 267 U. S. 404, 69 L. ed. 683;
Roundtree vs. Terrell, 22 F. Supp. 297;
Lord vs. Steamship Co., 102 U. S. 541.

(a) All such disputed shipments crossed the state line into Kansas.

(b) Reasons of business necessity were given for the entry into the Kansas depot or terminal, thus refuting a charge of subterfuge inferred solely from the more favorable interstate rate.

(c) The **physical facts** give character to interstate shipments distinguishing them from intrastate shipments. **Motives controlling those facts** have no bearing on the question. Especially is this true as to motives which are reasonable.

(d) The Commission's Rule 44 does not apply to any of appellant's disputed operations. Its only legitimate purpose was to prohibit shipments originating in Missouri and billed interstate, from terminating in Missouri en route.

A broader construction of the rule impinges upon the Congressional definition of "interstate commerce." (Motor Carrier Act, 1935; U. S. C. A. Title 49, Sec. 303 (a), par. 10.)

(e) The court abused its discretion in finding that appellant's disputed operations were mere subterfuge to favor his patrons with a lower rate, in the face of undisputed evidence of good business reasons for such operations. This inference of bad faith, if ever such operations were suspicious, should vanish in the light of such reasons.

(f) It is an erroneous conclusion of law that an applicant for an interstate permit must, in order to obtain it, waive questions of constitutionality of the conditions here imposed.

Frost vs. Railroad Commission of California, 271 U. S. 583; 46 S. Ct. 685;
Abie State Bank vs. Bryan, 282 U. S. 765; 51 Sup. Ct. 252.

It follows from these considerations that the disputed transactions were interstate in character, and permissible under appellant's interstate permit (absent the question of violation of police regulations), and the refusal of the court

to enjoin arrest and prosecution for engaging therein was an abuse of judicial discretion.

III.

The counterclaim interposed by the Public Service Commission in this case should have been dismissed by the District Court because it wholly fails to comply either with general legal principles governing counterclaims or with Equity Rule 30 of this court in particular.

57 Corpus Juris, p. 366;

Powell, et al. vs. United States, 300 U. S. 276; 57 Sup. Ct. 470, 477;

Equity Rule 30, 28 U. S. C. A. Title 28, sec. 723;

American Mills Co. vs. American Surety Co., 260 U. S. 360; 43 Sup. Ct. 149;

Cleveland Engineering Co. vs. Galion D. M. Truck Co., 243 Fed. 405.

(a) Since the state treasurer and not the Public Service Commission of Missouri is authorized to collect any fees due the state of Missouri for the use of the highways, the Public Service Commission of Missouri can no more maintain a counterclaim for the collection of such fees than it could maintain an independent suit against appellant for their collection, because it is not the real party in interest in such an action.

Laws of Missouri, 1931, pages 311-313, sec. 5272 (See Appendix).

(b) Since the recovery of fees for the use of the highways by any party would be an action at law, this counterclaim clearly fails to comply with that provision of Equity Rule 30 which authorized counterclaims which might be the subject of an independent suit in equity. It is also defective in this respect because it is not supported by any independent jurisdictional ground.

Cleveland Engineering Co. vs. Galion D. M. Truck Co., supra.

(c) Since the transaction which was the subject of the original action was the revocation of appellant's interstate permit and the consequent threatened arrest and prosecution of appellant for operating without such permit, while the transaction which was the subject of the counterclaim was the use of the highways by appellant, the counterclaim did not comply with that provision of Equity Rule 30 which authorizes counterclaims arising out of the transaction which is the subject matter of the original suit. It is also defective in this connection because such counterclaim would be legal whereas the rule requires an equitable counterclaim.

American Mills Co. vs. American Surety Co., supra.

ARGUMENT

ON THE MOTION TO DISMISS

First Ground

If we understand correctly the first contention of appellee's Motion to Dismiss, it is this: There are other reasons than Rule 44 that prompted the Commission to revoke the interstate permit, and since appellant calls attention only to Rule 44 in his statement of jurisdiction, that rule is not "dispositive of the case."

We interpret this as a contention that if the Commission had other reasons than Rule 44, and appellant has not called attention to them in his jurisdictional statement, the consequence is that he "does not preserve for the consideration of the Court those matters of fact and law * * *" for review.

There seems to be two answers to this contention: First, the jurisdictional statement does not perform the function of an assignment of errors. If the statement convincingly shows a justiciable question for this court it has performed its function, and nothing is lost by failure to argue the case in detail therein. Second, it is the **action** of the Commission—not the **reasons that prompted the action**—that is claimed to be unconstitutional and without authority.

There is one more observation by way of answer: If it were true as a matter of law as stated by appellee (and its legal truth is denied) "that there was evidence in abundance to sustain its (the court's) finding that the character of the commerce involved was intrastate and not interstate," of what significance is that? The Commission is not thus empowered to prohibit those transactions which are admittedly interstate in character, albeit it may punish for operating intrastate without an intrastate permit. Consequently, the Commission could not, without exceeding its powers, make the order complained of.

Second Ground

Appellee contends there is no final judgment from which an appeal can be taken. This contention fails in the light of the law and the facts. A permanent injunction was uncondi-

tionally denied. Section 380, Title 28, U. S. C. A. provides for an appeal from the judgment of a statutory court of three judges in such circumstances.

Judgment on the counterclaim was also final. The act of ascertaining the amount due was a ministerial act in fulfillment of that judgment.

Smith vs. Vulcan Iron Works, 165 U. S. 518, 17 S. Ct. 407;
McGourkey vs. Toledo & Ohio Ry. Co., 146 U. S. 536; 13 Sup. Ct. 170;
3 Corpus Juris, pp. 448, 449.

Furthermore, the question of the court's consideration of the counterclaim is one of jurisdiction. Under Equity Rule 30, the trial court was without jurisdiction to entertain, in a suit in equity, a counterclaim involving matters that are collateral to the equitable remedy sought, especially, as in this case, where no right or authority is shown to maintain the claim in a separate action for that purpose.

ON THE MERITS

This case is presented for review upon three principal points:

First, The Commission had no constitutional authority to revoke appellant's interstate permit.

Second, If the disputed acts of transportation are interstate in character, the Commission had no constitutional authority to arrest and prosecute appellant for engaging therein, absent violations of Missouri state police regulations.

Third, The District Court, by reason of Equity Rule 30, had no jurisdiction to entertain the counterclaim as an issuable pleading in this, an equitable action, for the reason that the claim involved a demand for money based upon considerations collateral to the injunctive relief sought, and for the further reason that the Commission had no authority to maintain the claim in a separate suit for that purpose.

We shall attempt to argue these points in their named order.

I.

On the Authority to Revoke the Interstate Permit

We present for the consideration and review of this point, the following bald questions: May a state regulatory body,

in its attempt to exercise its admitted jurisdiction, wield a weapon authoritatively entrusted only to a federal regulatory body? Specifically, may a state, in order to assure itself that no intrastate commerce shall be carried on unlawfully, prohibit all commerce, both intrastate and interstate? May a state arrest and prosecute appellant for engaging in admittedly interstate transactions of commerce, because perchance, he has also carried on some intrastate transactions?

This last sentence is not to be taken as an admission that the disputed transactions are, in fact and law, intrastate in character. As defined by the decisions of this court, they are not. (**See Missouri Pacific Railway Company vs. Stroud, 267 U. S. 404, and Western Union Telegraph Company vs. Speight, 254 U. S. 17.**) As defined in the Motor Carrier Act of 1935, they are not. (**See U. S. C. A. Title 49, Sec. 303 (a), par. 10.**) But the right of revocation does not rest upon the character of the disputed transactions. It goes far beyond that. If the transactions in dispute were ever so clearly of an interstate character, the question here raised is, by what right does the state, through its regulatory body, assume to arrest and prosecute one for engaging in interstate commerce except in the exercise of its police power thereunder? The question is here raised, may a state by withholding a permit for the latter, or by withdrawing one previously granted, effectively prohibit the exercise of the privilege absolutely? We think not. For the right to deny a privilege implies the right to grant it. Here, the source of the privilege is not in the state.

The consequence of the majority opinion is wholly to deprive appellant of his privilege to transport shipments in interstate commerce through Missouri, even such as may be destined to his terminals in Wichita, Kansas; Des Moines, Iowa, and Burlington, Iowa. It is not alone a question of equity, but one of power and authority of the Commission, which, if not derived from proper constitutional legislative authority, cannot be invested by a decree of a court. A necessary implication of the decision is that the state may prohibit commerce that is admittedly interstate because, forsooth, there has been **some** unlawful shipments in intrastate commerce. If this is the meaning of Rule 44 of the Commission, or any statute under which the Commission purports to act, such rule or statute is unconstitutional and void.

In **Buck vs. Kuykendall**, 267 U. S. 307, 45 Sup. Ct. 324, a

statute of the state of Washington prohibited common carriers for hire from using the highways over regular routes without having first obtained a certificate of public convenience and necessity. Plaintiff was denied such a permit to operate as an interstate carrier and his application for an injunction was denied by a statutory three-judge court. On appeal to the Supreme Court of the United States, the court, in an opinion by Mr. Justice Brandeis said (l. c. 315, 316):

> " * * * It may be assumed that section 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare Michigan Public Utilities Commission vs. Duke, No. 283, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed.—decided January 12, 1925. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of the federal action — the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. **Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct it. Such state action is forbidden by the commerce clause.** It also defeats the purpose of Congress, expressed in the legislation giving federal aid for the construction of interstate highways."

The sentences emphasized in the above quotation are applicable to the facts here. The view of the Florida Supreme Court relating to the power of the state in this matter is expressed in **Florida ex rel. Motor Co. vs. Florida R. R. Commission,** 166 South 840, as follows:

> " * * * the statutory requirement of a certificate of public convenience and necessity for an exclusively interstate motor carrier operation was in legal effect nothing more than a requirement for registration of such an operation for the purpose of identifying it as such and applying to it the state's mileage tax charge for use of the highways and the state police regulations pertaining to such operations as a means of promoting the public safety, and that being such, every application for exclusively interstate operation of a motor carrier was grantable to the applicant under the Florida statute as a matter of course after a reasonable opportunity had been afforded to the Railroad Commission to investigate and determine its bona fides and identify as an operation that was in truth and in fact exclusively interstate in character."

Supporting this line of reasoning is the case of **Southwestern Greyhound Lines vs. R. R. Commission,** 99 S. W. (2d), 263, 268, 109 A. L. R. 1235, wherein the court construed the Federal Motor Carrier Act of 1935 as follows:

> "An analysis of the act clearly shows that it was the purpose of Congress, in enacting this law, to delegate to the Interstate Commerce Commission the exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce on the highways for a certificate of public convenience and necessity. Such construction of the law does not deprive the state from protecting its highways and the public safety by reasonable and uniform regulations, and exacting reasonable compensation for the use of such highways. Michigan Public Utilities Commission et al. vs. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105; Buck vs. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286. * * *"

To the same effect are the decisions to be found in annotations as follows: 36 A. L. R. 1110; 38 A. L. R. 291; 47 A. L. R. 230; 49 A. L. R. 1203; 62 A. L. R. 52; 85 A. L. R. 1136.

Acceptance of Permit Did Not Constitute a Waiver of Constitutional Rights

The trial court erred in ruling that appellant, by his acceptance of the interstate permit upon the conditions therein imposed, waived his right to challenge the constitutional validity of Rule 44, and the validity of the action of the Commission thereunder. The court's position seems to be predicated upon the proposition that appellant, having accepted the permit upon the conditions imposed, is bound by these conditions regardless of the constitutional authority to impose them. This is not the law. A distinction must be made between permits or licenses which **confer a right,** and those which merely **regulate** it. In the one case the source of the right is in the licensing authority, and being the source, it may confer it upon condition or withhold it altogether. In the other case the source of the right is elsewhere, but may be regulated by an inferior licensing authority.

Federal constitutional privileges are not granted by a state or any of its agencies. Nor can they compel these privileges to be foresworn as a condition to regulation, though regulation must be submitted to. If, in submitting to regulation (admittedly compulsory) one must surrender constitutional privilege (non-compulsory), how can it be said that the surrender is voluntary? And, if involuntary, how can there be a waiver?

This question is settled in **Frost vs. Railroad Commission of California,** 271 U. S. 583; 46 S. Ct. 685, l. c. 607:

> "May it stand in the conditional form in which it is made here? If so, constitutional guarantees so guarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. * * * In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."

The court has found as a matter of law that appellant has violated the express terms of his permit. Even if this were true now, which we do not concede, it could not have been stated categorically as a fact prior to the filing of the opinion. The extreme remedy of revocation was invoked for an act the consequences of which could not have been foreseen, and in the contrary seems to be justified in the light of judicial decisions and the Motor Carrier Act. How can appellant be said to have waived that which he could not foresee? Appellant had the right to assume that a sovereign state will not seek to impose unconstitutional conditions.

The thought is well expressed in **Abie State Bank vs. Bryan,** 282 U. S. 765, 776; 51 Sup. Ct. 252, l. c. 257:

> "The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable."

II.

The Disputed Acts of Commerce Were Interstate in Character; Hence, the Court Should Have Enjoined Arrest and Prosecution

It is appellant's contention, however, that every part of his operations were interstate in character and that the court should have enjoined arrest and prosecution for engaging in the disputed transactions. Equity does not do things by halves. In order that full justice may be done to appellant, his claimed status as an exclusively interstate carrier should be determined in this case. He has not sought an intrastate permit nor does he desire to engage therein unlawfully. He claims, however, the right to do the things complained of under his interstate permit. Appellant is entitled **first** to know if his interstate permit was wrongfully revoked, **second** to know if, under an interstate permit, he is wrongfully engaging in the disputed transactions. Unless these two points be decided together in this case the entire remedy sought in applicant's petition will not be afforded. It therefore becomes necessary to determine the character of the commerce in dispute.

Long before the Motor Carrier Act of 1935 exclusive jurisdiction over interstate commerce was in the Federal government. That act is merely the machinery for exercising that power. Thus Congress has definitely defined what acts shall be considered as interstate commerce in the very field with which we are concerned. In doing so it has merely followed what has long been the accepted definition of the term. The route which the shipment actually travels has always been the determing factor. In the case of **Hanley vs. Kansas City Southern Ry. Co.**, 187 U. S. 617, l. c. 620, the court cites with approval 9 Sawyer 258 in which it is said:

> "To bring the transportation within the control of the state, as a part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."

The same rule was applied by the Supreme Court in **Lord vs. Goodall,** N. & P. SS. Co., 102 U. S. 541, where it was held that a shipment by sea between two ports in the same state, which is made in part upon the high seas, is foreign commerce and beyond the power of the state to regulate.

Again in 1935 this court decided the very question here involved in holding that transportation from a point in Missouri to another point in Missouri over a route partly within and partly outside of Missouri is interstate commerce. **(Mo. Pac. Ry. Co. vs. Stroud,** 267 U. S. 404.) In that case it appeared that the carrier had two routes by which freight might move between two points within the state, one wholly within the state, and the other partly through another. It was shown that a shipment between these points would, following the carrier's practice, pass over the latter route. In consequence of this the court held that the character of the commerce was interstate. In the instant case the appellant's business practice made it impossible to confine his route entirely within the state of Missouri. As was aptly said by the dissenting judge below, "It is not usual for freight to be thrown off a train between stations although the consignee lives between them."

In **Western Union Telegraph Co. vs. Speight,** 254 U. S. 17, this court considered a situation analogous to that presented here. The court in an opinion written by Mr. Justice Holmes, said (l. c. 18):

"The message was from Greenville, North Carolina, to Rosemary in the same state, and was transmitted from Greenville through Richmond, Virginia, and Norfolk, to Roanoke Rapids, the delivery point for Rosemary. This seems to have been the route ordinarily used by the company for years and the company defends on the ground that the message was sent in interstate commerce and that therefore a suit could not be maintained for mental suffering alone. * * * The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the law of North Carolina and gave the plaintiff a verdict. The presiding judge then set the verdict aside 'as a matter of law' and ordered a nonsuit. But on appeal the Supreme Court of the State set aside the nonsuit and directed that a judgment be entered on the verdict.

"We are of opinion that the judge presiding at the trial was right and that the Supreme Court was wrong. Even if there had been any duty on the part of the telegraph company to confine the transmission to North Carolina it did not do so. **The transmission of a message through two states is interstate commerce as a matter of fact.** (Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333) **The fact must be tested by the actual transaction.** (Kirkmeyer v. Kansas, 236 U. S. 568, 572, 35 Sup. Ct. 419, 59 L. Ed. 721. * * * The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement but held that when, as here, the termini were in the same state the business was intrastate unless it was necessary to cross the territory of another state in order to reach the final point. This, as we have said, is not the law. * * * * " (Emphasis ours.)

In **Roundtree vs. Terrell,** 22 F. Supp. 297, the court held that where a carrier transports shipments by truck from Dallas, Texas, to his terminal in Texarkana, Arkansas, and later, by means of his local delivery truck transported it back across the state line into Texarkana, Texas, was engaged in interstate commerce. The circumstances in that case were identical in every material respect with those in this case, and the Federal District Court for the northern district of Texas came to a conclusion opposed to the conclusion reached in this case.

Hence we submit that as a matter of law the movement of freight in the manner of the circumstances of this case constitutes interstate commerce, and was so held to be long before the Motor Carrier Act of 1935. Subsequent to the passage of that act there can be no doubt of the character of the commerce. Congress has clearly defined interstate commerce by motor vehicles and placed such commerce under the sole jurisdiction of the Interstate Commerce Commission and this definition is in harmony with all the prior definitions of the courts.

The Charge of Subterfuge is Refuted By Evidence of Business Convenience

Appellant established his Kansas City, Kansas, terminal at the beginning of his operations as a motor carrier. It is the only terminal which appellant ever had in this area and was so located prior to the promulgation by any legal authority of tariffs affecting either interstate or intrastate carriage of property. This seems to be a complete answer to a charge that the terminal was located in Kansas in order to afford appellant's patrons the lower interstate rate. There were sound business reasons for so locating it. His office and terminal were in a large building with convenient facilities for loading and unloading trucks, parking trucks, handling freight and otherwise transacting a trucking business. In the same building there were several other non-competing carriers with whom inter-line connections were established for the transportation of freight. The location was in close proximity to large shippers of freight by truck, and in fact these shippers were largely instrumental in inducing the appellant to choose this location as one most convenient for all concerned. The very same considerations that induced the location in Wichita, Kansas; Des Moines, Iowa, and other terminals were employed in locating the terminal at Kansas City, Kansas. It was so located at a time when there were no established rates, either intrastate or interstate, by regulatory authority; consequently, there is no justification for an inference that the decision on the location was induced in order to afford appellant's patrons the benefit of the interstate rate.

Under the Federal Motor Carrier Act of 1935 a carrier engaged in interstate commerce is required to charge the rate on file with the approval of the Interstate Commerce Commission, and if such rate is not charged he subjects himself to

fine and imprisonment as set out in the Federal Motor Carrier Act. This case develops that if there is a difference in the interstate and intrastate rate and the carrier complies with the Federal Act and charges the federal interstate rate his certificate may be revoked, as in this case, because he charges a different rate. The reason given by the Commission in revoking his certificate was that shippers in using his service between St. Louis, Missouri, and Kansas City, Missouri, via his terminal in Kansas City, Kansas, were afforded a lower freight rate than the rate established by the Public Service Commission on intrastate traffic. This the court believed was a subterfuge.

The character of the "pick-up" and "delivery" service employed at the Kansas City, Kansas, terminal differed in no respect from the service employed at other terminals. In every case the shipments traversed the entire distance between terminals. It was necessary for it to do so in order that all matters pertaining to billing, checking, loading and unloading, weighing, classifying, making inter-line connections, making collections, etc., may be performed. Yet, with all of the legitimate reasons for conducting the business in the manner described, the court found that the disputed transactions were subterfuges to afford patrons the benefit of the lower rate, when as a matter of law the Interstate Commerce Commission is directed to fix the rates. It is earnestly contended that this was an abuse of judicial discretion on the part of the court, in view of controlling decisions of this court (see Missouri Pacific R. R. Co. vs. Stroud, 267 U. S. 404, and Western Union Telegraph Company vs. Speight, 254 U. S. 17).

The Physical Facts Determine the Character of the Commerce

But regardless of motive, the trial court was bound by the facts in the case, for it is the facts, and not the motive which characterizes the commerce. This is clearly shown to be the ruling of this court from the excerpts taken from the last two cases above cited. It is likewise written into the Congressional definition of "interstate commerce" as follows:

> "(10) The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor ve-

hicle or partly by motor vehicle and partly by rail, express or water." (Motor Carrier Act 1935, U. S. C. A. Tit. 308 (a), Par. 10.)

For the foregoing reasons it is earnestly contended that the trial court should have permitted itself to be governed by the actual facts that transpired in the course of the commerce even though it may have believed that the Commission's Rule 44 was being violated, for the reason that said rule must give way to the Congressional definition in all respects in which it conflicts.

Commission's Rule 44, Reasonably Interpreted, Does Not Apply to the Disputed Transactions

This point is ably dealt with in the dissenting opinion. The only legitimate purpose of Rule 44 was to prohibit shipments originating in Missouri and billed interstate, from terminating in Missouri en route. A broader construction of the Rule would, to the extent that it conflicts with the congressional definition, render it invalid. Only that construction should be placed upon it which would give it validity as a law.

If the first sentence of the rule means literally what it says, then clearly it conflicts with the Federal statute. For that statute states that commerce "between places in the same state through another state" is interstate commerce. The majority opinion states this does not describe a situation where the carriage is "merely over a state line and immediately back again." But in the quoted decisions of this court, the situation was just that. And if just consideration is given to the reasons why it was so, there is no occasion for the charge of subterfuge.

III.

On the Counterclaim

We earnestly contend that the counterclaim filed in this case by the Public Service Commission wholly fails to comply with the prerequisite of a proper counterclaim, either under Equity Rule 30, or general legal principles governing counterclaims. We believe that the first and absolute requirement of any counterclaim is that it must represent some claim of the defendant in the principal cause of action against the plaintiff. It can never be the basis of asserting some claim

which some other person, not a party to the principal suit, might have against the plaintiff. In other words, the party who interposes a counterclaim should be the real party in interest in that action just as the plaintiff in the original action must be in the real party in interest in the original complaint. In 57 C. J., p. 366 a counterclaim is defined:

> "It is substantially a cross action by defendant against plaintiff, and secures to defendant the full relief which a separate action at law, a bill in chancery, or a cross bill would have secured him on the same state of facts. * * * It is defined judicially as a cause of action in favor of defendant upon which he might have sued plaintiff and obtained affirmative relief in a separate action. * * *"

The State Treasurer Alone is Authorized to Sue for the Fees.

The counterclaim shows on its face that a right of the state of Missouri and not of the defendant Public Service Commission is being asserted. The counterclaim states that the Public Service Commission files this counterclaim against plaintiff "for fees owing by plaintiff to the state of Missouri" and prays the court "to provide the means whereby the amount of moneys owing by plaintiff to the state of Missouri may be equitably and accurately determined." Thus it becomes apparent that the right attempted to be asserted by the Public Service Commission against the plaintiff is one which belongs solely to the state of Missouri. Furthermore, the lower court in its conclusions of law does not find otherwise. The court found (Record, page 66). "That the plaintiff is indebted to the state of Missouri for license fees and charges accumulated since the granting of a temporary restraining order in this case, and the state is entitled to judgment, therefor." However, in its decree the court rules (Record, page 81) "That the defendants are entitled to recover on their counterclaim from the plaintiff on behalf of the state of Missouri certain license fees and other charges accruing during the pendency of this suit and the effective period of the temporary injunction." But upon what authority did the court rule that the defendant Public Service Commission was entitled to recover "on behalf of the state of Missouri?" We have been unable to find any statute which provides for the collection

by the Public Service Commission of fees owing to the state of Missouri by motor carriers operating over the highways of Missouri. In **Laws of Missouri**, 1931, pp. 311-313, Sec. 5272, it is provided that such fees shall be collected by the state treasurer of the state of Missouri. Therefore, if plaintiff owes fees for the use of the highways of the state he owes them to the State Treasurer, and not to the appellee Public Service Commission. It follows that since the Public Service Commission could not maintain an action against the plaintiff for such fees it cannot interpose a counterclaim for their collection in this cause.

Equity Rule 30 is Violated by the Action of the Court in Entertaining the Counterclaim

But let us assume for the moment that the Public Service Commission could maintain such a suit. The counterclaim filed in this case would still be fatally defective because it utterly fails to comply with the requirements of Equity Rule 30 of this court. Under this rule the defendant must interpose a "counter-claim arising out of the transaction which is the subject matter of the suit," and may interpose a "counter-claim against the plaintiff which might be the subject of an independent suit in equity against him." It is evident that the counterclaim in question does not fall within the latter class. Aside from the fact that the matter raised could not be the subject of any suit by the Public Service Commission as pointed out above, the recovery of fees certainly could not be made the subject of an independent suit in equity. In any event a suit for the recovery of fees would necessarily be an action at law.

But there is still another reason why this counterclaim could not fall under the latter class mentioned in the rule. There would be no independent federal jurisdiction to support it. In **Cleveland Engineering Co. vs. Galion D. M. Truck Co.**, 243 Fed. 405, 407, the principle is thus stated:

> "It is true that a set-off or counterclaim which is the subject of an independent suit in equity can not be sustained, unless some independent ground of federal jurisdiction is shown to support it. The jurisdiction of the court invoked by complainant in its bill, and shown by the allegations thereof, does not aid or support the juris-

> diction of this court when the defendant brings forward a set-off or counterclaim which may be the subject of an independent suit, and which does not merely concern matters already put in litigation by the original bill. It follows, therefore, in that situation, if there is not diversity of citizenship, or if the subject-matter of a counterclaim is not within the jurisdiction of a federal court, the counterclaim should be stricken out for want of jurisdiction. * * * "

Since there would be no ground of federal jurisdiction to support a suit by the Public Service Commission against this appellant for the purpose of collecting fees for the use of the highways, a counterclaim interposed for that purpose must fail for the same reason.

Nor can the counterclaim be justified under the first class set out in the rule. In the opinion of the majority of the lower court it is said that it is doubtful if this counterclaim arose out of the transaction which is the subpect matter of the suit. We contend that the counterclaim clearly does not arise out of the transaction which is the subject matter of the suit. That transaction was the revocation or threatened revocation of appellant's permit to operate as a motor carrier over the highways of the state of Missouri, together with the consequent interference with appellant's operations by state officials. It was to restrain this interference that the injunction suit was instituted. An action to recover fees would arise out of the use of the highways. It is difficult to understand how the withdrawal of the use of the highways and the use of the highways could be considered the same transaction. **Powell vs. United States,** 300 U. S. 276.

The Counterclaim Was Not an Equitable Action, But Was Clearly an Action at Law

But apart from this defect the counterclaim in question does not comply with either requirement of Equity Rule 30 for the reason that it is not equitable in its nature. In **American Mills Co. vs. American Surety Co.,** 260 U. S. 360, l. c. 364 this court construed the rule in the following manner:

> "The petitioner argues that **must** and **may** are here set over against one another for the purpose of enforcing the intention and effect of the rule to require the de-

fendant in an action in equity to set out any counterclaim arising out of the subject-matter of the bill, but to leave it to the option of the defendant whether a counterclaim or set-off not arising out of the same transaction shall be interposed or shall be prosecuted by independent bill. The respondent contends that while this may be correct, the counterclaim growing out of the same transaction must be an equitable claim and not a legal one as here. We concur in this view.

"The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence and by uniting in one action as many issues as could be conveniently disposed of. But they normally deal with subject-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the federal statutes, practice and decisions when the rules were promulgated. * * * The counterclaim referred to in the first part of the paragraph must therefore be an equitable counterclaim, one which like the set-off or counterclaim referred to in the next clause could be made the subject of an independent bill in equity. The counterclaim and the set-off and counterclaim in the two clauses are **in pari materia,** except that the first grows out of the subject-matter of the bill and the other does not. * * * The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative."

Since any action for the recovery of fees for the use of the highways would be a legal action it seems evident that the counterclaim in question clearly fails to comply with Equity Rule 30. We submit, therefore, that the majority of the lower court erroneously admitted it as a pleading in this cause.

Counterclaim Should Have Been Dismissed For Want of Jurisdiction

The whole question of the court's jurisdiction to entertain the counterclaim is aptly stated in **Powell et al. vs. United States,** 300 U. S. 376; 57 Sup. Ct. 470, l. c. 477 as follows:

"The counterclaim was not properly before the court and could not be entertained as an incident to or part of the suit to set aside the Commission's order respecting the tariff.

The Seaboard's bill merely assails the Commission's order. The issue between the original parties is confined to its validity. The suit is a statutory one triable only in a specially constituted court. The counterclaim is based on a violation of section 1 (18); the facts alleged are not sufficient to constitute a cause of action within the jurisdiction of that court. **Pittsburg & West Va. Ry. Co. vs. United States,** 281 U. S. 479, 488, 50 S. Ct. 378, 381, 74 L. Ed. 980. Moreover, the counterclaim does not arise out of the transaction that is the subject of the suit and is not germane or related to it. Equity Rule 30 (28 U. S. C. A. following section 723) cannot reasonably be construed to authorize intervening defendants, in a suit to set aside an order of the Commission, to set up counterclaims not arising out of or related to the subject matter of the suit. That would permit complications likely to burden and impede and would be contrary to the purpose and intent of the rule. **Chandler & Price Co. vs. Brandtjen & Kluege, Inc.,** 296 U. S. 53, 59, 56 S. Ct. 6, 8, 80 L. Ed. 39. The counterclaim, not being within the jurisdiction of the specially constituted court, should have been dismissed for want of jurisdiction. **Pittsburgh & West Va. Ry. Co. vs. United States,** ubi supra."

CONCLUSION

We respectfully contend that the District Court abused its scretion in denying the permanent injunction applied for d was without jurisdiction to entertain the counterclaim, r the reasons hereinbefore set forth. The judgment should reversed and the cause remanded with instructions to ter a decree for permanent injunction and to dismiss the unterclaim.

Respectfully submitted,

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APPENDIX

Rule 44 of the Public Service Commission of Missouri reads as follows:

> "No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

Section 5267(b), Laws of Missouri, 1931, page 306 reads as follows:

> "The public service commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined."

Section 5269, Laws of Missouri, 1931, referred to in the opinion of Reeves, J., page 12 of the jurisdictional statement reads as follows:

> "DISCONTINUANCE OF SERVICE—FORFEITURE —SUSPENSION—REVOCATION.—No motor carrier authorized under the provisions of this act to operate within the state of Missouri shall abandon or discontinue any service established under the provisions of this act without an order of the commission therefor, which said order shall be granted only by the commission after hearing upon due notice. The commission may at any time, for good cause, suspend, and upon at least ten days notice to the grantee of any certificate, and an opportunity to be heard, revoke, alter or amend any cer-

tificate issued under the provisions of the act; PROVIDED, that on finding of the commission that any motor carrier does not give convenient, efficient and sufficient service in accordance with the orders of the commission, such motor carrier shall be given a reasonable time, not more than sixty days, to provide such service before any existing certificate is cancelled or revoked or a new one granted to some other motor carrier over the same route."

Motor Carrier Act 1935, U. S. C. A. Tit. 303(a), Par. 10, reads as follows:

"(10) The term "interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water."

Equity Rule 30, U. S. C. A. reads as follows:

"RULE 30. ANSWER — CONTENTS — COUNTERCLAIM.— * * * The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims.

When in the determination of a counterclaim complete relief cannot be granted without the presence of parties other than those to the bill, the court shall order them to be brought in as defendants if they are subject to its jurisdiction. (Amended May 4, 1925.)"

The pertinent points of Section 5272, Laws of Missouri 1931, pages 311-313 are as follows:

" * * * In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5265 of this act shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1 and January 15 of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; all such fees levied upon the issuance of a license to any motor carrier for any motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued; * * * "